IN THE

Supreme Court of the United States

October Term, 1975

No. 75-854

TRANS WORLD AIRLINES, INC.,

Petitioner,

—against—

HUGHES TOOL COMPANY and RAYMOND M. HOLLIDAY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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December 18, 1975

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The petitioner, Trans World Airlines, Inc. ("TWA"), respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on March 7, 1975.

Opinions Below

The opinion of the court of appeals is reported at 515 F.2d 173 and appears in the annexed Appendix at p. A-3 *et seq.* The opinion of the United States District Court for the Southern District of New York is not officially reported but is unofficially reported at CCH 1974-1 Trade Cas. ¶74,889 and appears in the annexed Appendix at p. A-1 *et seq.*

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered on March 7, 1975. A timely petition for rehearing and suggestion for rehearing *en banc* was denied on September 25, 1975, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Question Presented

May a court of appeals, in reviewing an award of $1,015,625 in costs to prevailing defendants for expenses in providing security in lieu of a supersedeas bond, substitute its judgment as to the proper exercise of discretion for that of the district court and allow still further costs of $683,825.40 for additional items of expense in providing such security which had been expressly disallowed by the district court on the ground that they were unnecessary and were voluntarily incurred by defendants?

Rules Involved

Fed. R. App. P. 39(a):

> "(a) To Whom Allowed. Except as otherwise provided by law, • • • if a judgment is reversed, costs shall be taxed against the appellee unless otherwise ordered; • • •."

Fed. R. App. P. 39(e):

> "(e) Costs on Appeal Taxable in the District Courts. • • • the premiums paid for costs of supersedeas bonds or other bonds to preserve rights pending appeal • • • shall be taxed in the district court as costs of the appeal in favor of the party entitled to costs under this rule."

Statement of the Case

This petition is the epilogue to an action twice previously before this Court (380 U.S. 248; 409 U.S. 363), and characterized by Mr. Chief Justice Burger as "a 20th-century sequel to Bleak House" (409 U.S. at 393). The final issue presented is whether TWA, the unsuccessful plaintiff which has already paid the defendants $1,272,413.76 in costs,* must now pay additional costs of $653,805.40. Such additional costs were disallowed by the district court after a hearing, but the court of appeals reversed, one judge dissenting as to all but a minor part thereof. This petition seeks review of that court of appeals judgment.

1. *Summary history of the action*

The complaint was filed in the Southern District of New York on June 30, 1961. The legal issues that proved ultimately dispositive of the action were first raised on August 9, 1961 when Hughes Tool Company** filed its motion to dismiss and for summary judgment, asserting that (1) the antitrust violations alleged in the complaint were within the exclusive jurisdiction of the Civil Aeronautics Board (the "CAB") and (2) the conduct alleged in the complaint was immune from the antitrust laws because approved by the CAB. Toolco elected, however, not to bring that motion on for decision.

On August 31, 1961 the action was assigned "for all purposes" to Judge Charles M. Metzner, who has presided

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* This total includes $257,844.76 of costs not related to the provision of security for a stay, which TWA does not dispute.

** Respondent Hughes Tool Company changed its name to Summa Corporation late in 1972, but here, as in the past, we will refer to it as "Toolco" and to respondents Toolco and Holliday collectively as "defendants."

over all proceedings in the action in the district court since that date. After defendants had consumed an entire year with depositions of TWA, the district court on January 9, 1963 ruled that TWA and the additional defendants could commence their own discovery with the deposition of Hughes, Toolco's sole stockholder who had never been served in the action, beginning on February 11, 1963. After this firm date for Hughes's deposition was fixed, Toolco on February 1, 1963 brought on for determination the motion to dismiss it had orginally filed in August 1961. On February 6 the district court denied the motion, filing its opinion the next day (214 F.Supp. 106). On February 8, the last business day before the deposition was to begin, Toolco informed the district court and the other parties that Hughes would not appear. As a result of that refusal to proceed with the Hughes deposition and Toolco's refusal to obey other discovery orders, the district court on May 3, 1963 entered a default judgment in TWA's favor (32 F.R.D. 604).

An interlocutory appeal by the defendants pursuant to 28 U.S.C. §1292(b) resulted in an affirmance by the court of appeals (332 F.2d 602). This Court granted certiorari (379 U.S. 912) but on May 8, 1965, after full briefing and oral argument, dismissed the writ as improvidently granted (380 U.S. 248).

Upon remand, after an extensive damage hearing before Special Master Herbert Brownell, Judge Metzner confirmed the Special Master's report (308 F.Supp. 679) and on April 14, 1970 entered a judgment for TWA of $145,448,141.07 (312 F.Supp. 478). That judgment was affirmed by the court of appeals (449 F.2d 51), but on January 10, 1973, this Court reversed and remanded, with directions to dismiss the complaint (409 U.S. 363). The grounds for that

decision were those originally raised by Toolco's 1961 motion to dismiss.

One consequence of this Court's decision was the taxation of costs against TWA in favor of the prevailing defendants. There have been taxed against and paid by TWA costs in this Court of $16,847.24, costs in the court of appeals of $71,521.42, and costs in the district court of $1,184,045.10, including $1,015,625 for interest paid on a letter of credit, which was filed by defendants as security in lieu of a supersedeas bond. While various of these costs were contested by TWA below, none is contested here.

What is contested is $683,805.40 of additional costs, disallowed by the district court but allowed by the court of appeals, for additional items of expense incurred by defendants under terms of the district court's 1970 order permitting them to appeal without posting an ordinary supersedeas bond. That contested amount is made up of $617,765 for charges for special quarterly audits by Toolco's auditors during the period within which security in lieu of a supersedeas bond was posted, and $66,040.40 for charges incurred purportedly in connection with Toolco's collateralizing its $75 million letter of credit from Bank of America.

2. *Proceedings leading up to the stay*

Following entry of judgment for TWA on April 14, 1970, in the amount of $145,448,141.07 plus interest, defendants moved by order to show cause for a stay of execution pending appeal either without security or, alternatively, secured by a lien on specific property in lieu of a normal supersedeas bond (5a-6a).* Hearings on de-

* References to "....-a" are to pages of the Appendix filed with the court of appeals.

fendants' motion were held before the district court on May 11, May 20 and June 3 (19a-70a).* At those hearings TWA argued that it was entitled to the full protection normally afforded to a successful litigant when execution is stayed pending appeal, but that if a bond in the full amount of the judgment were not to be provided, then TWA was entitled to some other form of undertaking, binding on Hughes personally, which would guarantee the ultimate collectibility of the judgment. TWA pointed out that Hughes was personally outside the jurisdiction of the federal courts, and that he had both the absolute power to cause Toolco to take any action which he desired with respect to its assets and the habit of taking major actions in absolute secrecy. TWA suggested such alternatives as the hypothecation by Hughes of his stock in Toolco as security for the judgment, a personal undertaking by Hughes to the court that the judgment would be paid, and a reasonable restriction on Toolco's payment of dividends to Hughes, its sole stockholder (22a-25a, 30a, 51a-52a, 54a-55a, 63a-64a; Transcript of the Hearing of June 3, 1970, pp. 8-11, 22). None of these steps would have involved any significant expense, either to Toolco or to Hughes. Toolco's position, however, as the district court itself stated (80a; *see also* 202a), was that it should be permitted, without providing a bond in any amount, "to conduct business as usual," an enterprise which, at that time, apparently included converting its cash and other high-liquidity assets into fixed assets (71a-72a, 80a). In place of the guaranty sought by TWA, Toolco volunteered to provide quarterly audit reports from its outside

* The transcript of the June 3, 1970 hearing was placed under seal by the district court at Toolco's request and was not reproduced in the printed appendix filed with the court of appeals. Four copies of the transcript, under seal, were filed by Toolco with the clerk of the court of appeals pursuant to that court's order.

auditors, Haskins & Sells (Transcript of Hearing of June 3, 1970, p. 23). Haskins & Sells made such audits annually in any event; Toolco's proposal was for additional audits to be made at the end of the first, second and third quarters in each year. It is the expense of these additional audits that has been charged to TWA.

TWA protested that it desired either actual security or some affirmative order or undertaking that would be effective against a possible move by Hughes to strip Toolco of its assets. As to quarterly financial statements, while TWA welcomed them, it expressly stated that they need not be certified by outside auditors—certification by responsible Toolco financial officers would be adequate (28a; Doc. 16, p. 4*).

On June 10, 1970 the district court entered an opinion and order directing defendants to post security in the amount of $75 million, with the balance of the judgment to be secured by Toolco's maintaining its net worth at three times the amount of such balance (81a). After further hearings were held on the form and nature of security to be provided by defendants (82a-85a, 94a-103a), the district court entered orders dated June 16, 1970 (86a-91a) and June 25, 1970 (104a-107a), approving the final form of security, including provision for certified quarterly audit reports as proposed by Toolco, and substitution of a letter of credit in the amount of $75 million in lieu of a supersedeas bond.

3. *Taxation of costs*

After this Court's January 1973 decision, a judgment dismissing TWA's complaint was entered by the district

* References to "Doc. 16" are to part of the original record on appeal which was not reproduced in the printed appendix before the court of appeals. Copies, however, were provided to the court of appeals upon the oral argument.

court on May 23, 1973 (359 F.Supp. 783, 112a). Defendants filed a verified bill of costs on September 17, 1973 (113a-114a), and, after proceedings before him, the clerk of the district court entered a judgment for costs of $1,941,639.15 against TWA on October 16, 1973 (115a).

TWA moved before the district court for retaxation of costs on October 17, 1973 (116a-169a), and that motion was argued on November 15, 1973 (186a-200a). In an opinion and order dated January 10, 1974 (201a-202a), the court confirmed the clerk's allowance of $173,022.75 for costs at the district court level (202a) and granted TWA a setoff of $4,602.65 in costs for deposition expenses incurred when Hughes's deposition was precipitously cancelled. The district court also confirmed the Clerk's award of $1,015,625 in costs for interest charges paid by defendants to Bank of America for issuing the $75 million letter of credit, reasoning that that "charge is similar to the premium paid for a supersedeas bond" (201a). The district court disallowed the amounts taxed by the Clerk for quarterly audit charges and for charges for collateralizing the letter of credit (201a-202a).

The court of appeals reversed as to both items. The two-judge majority said of the auditing charges:

> "In our view the costs of the audits under the consent order were costs in lieu of providing a supersedeas bond as provided by the rules. Just as the court allowed the one-half of one per cent premium on the letter of credit, so too it should have allowed the costs for the audits. To be sure, this was a price of doing business as usual, but that is true in the case of any supersedeas bond on appeal. We fail to see how the court's wise exercise of its discretion in an unusual case not to require security by way of a bond may be used to justify the disallowance of the costs of procuring alternate security for the appeal." (A-9, 515 F.2d at 177; footnote omitted)

Dissenting from this view, Judge Timbers argued that the majority's ruling on the audit charges "• • • results in placing the imprimatur of this Court on permitting a party called upon to bond a judgment to conduct business as usual pending appeal and then to saddle his opponent with the expenses of doing so—in the teeth of an express finding by the district court that such expenses were unnecessarily costly, clearly avoidable and therefore not properly chargeable as taxable costs" (A-15-16, 515 F.2d at 180).

The court of appeals also reversed Judge Metzner's disallowance of the $66,040.40 of expenses incurred by Toolco in obtaining the letter of credit, apparently because the issuing bank had made it a condition precedent that the letter of credit be secured (A-11, 515 F.2d at 178-79).

Reasons for Granting the Writ

This Court is only rarely called upon to consider the taxation of costs by district courts, in part, of course, because typically the amounts involved are small. It has, however, laid down two important principles, both of which have been ignored by the court of appeals.

First, in *Newton* v. *Consolidated Gas Co.*, 265 U.S. 78 (1924), the Court stated that, except where there is a question as to the court's legal power to award costs, the allowance of costs to a successful litigant should be left to "the discretion vested in the trial court." (265 U.S. at 83)

Second, in *Farmer* v. *Arabian American Oil Co.*, 379 U.S. 227 (1964), which also reaffirmed this principle (at 231-33), a further guideline was added:

> "Items proposed by winning parties as costs should always be given careful scrutiny. Any other practice would be too great a movement in the direction of some systems of jurisprudence that are willing, if not indeed anxious, to allow litigation costs so high as to discourage litigants from bringing lawsuits, no matter how meritorious they might in good faith believe their claims to be." (379 U.S. at 235)

We submit that the *Farmer* rule precludes allowance of any cost, even if apparently proper, which is shown to have been voluntarily and unnecessarily incurred.

1. *The court of appeals has improperly substituted its discretion for that of the trial court*

As Judge Timbers suggests in his dissenting opinion, prior to the decision in this case it had seemed to courts, commentators and litigants alike that "[t]here are few areas where • • • it was more axiomatic that the exercise of discretion by a trial judge should not be disturbed absent the clearest showing of abuse than in the taxation of costs" (A-12, 515 F.2d at 179). Without unnecessary multiplication of authorities, it is evident that this has been the universal view. *See, e.g., Farmer* v. *Arabian American Oil Co.*, 379 U.S. 227, 235-36 (1964); *McDonnell* v. *American Leduc Petroleums, Ltd.*, 456 F.2d 1170, 1188 (2d Cir. 1972); *Oscar Gruss & Son* v. *Lumbermens Mutual Casualty Co.*, 422 F.2d 1278, 1284-85 (2d Cir. 1970); 10 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE: CIVIL §2688 (1973). As this court explained in *Newton* v. *Consolidated Gas Co., supra*, the reason discretion in such matters is vested in the trial court is "the better opportunity of that court to exercise [its] discretion from its greater intimacy with details of the pleadings, hearings, and orders in the case." (265 U.S. at 83.)

The court of appeals has departed from these principles, and has done so in a singularly inappropriate case.

Judge Metzner has presided over every proceeding in the district court in this action since August 1961. His decision to permit defendants a stay pending appeal on a different kind of security than an ordinary supersedeas bond—security which offered TWA substantially less assurance than a supersedeas bond that its judgment would be paid—followed months of briefing, hearings and intensive consideration. The decision was, indeed, characterized even by the court of appeals majority as a "wise exercise of [the district court's] discretion in an unusual case" (A-9, 515 F.2d at 177).

Nonetheless, that majority saw fit to substitute its judgment for that of the same trial judge in deciding which of the expenses incurred pursuant to his order were properly taxable against the losing party.

There is no suggestion in the majority's opinion, despite its citation of Fed. R. App. P. 39(a) and (e), that the result it reached was compelled by that Rule. The ground for the majority's opinion seems instead to have been that "[t]he district court sets forth no criteria for the disallowance of this item of costs" (A-10, 515 F.2d at 178). Yet as Judge Timbers urged in dissent:

> "• • • the record demonstrates with abundant clarity that the judge's action represents a classic exercise of sound discretion by a thoroughly experienced trial judge in the context of exceedingly complex litigation with which he has lived for a decade and a half." (A-13, 515 F.2d at 179)

That record shows clearly that the quarterly audit reports were volunteered* by defendants as an alternative

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* Indeed, defendants' counsel so stated to the district court at the hearing on June 3, 1970 (p. 23).

to the positive protection which TWA was seeking against activities by Hughes, over whom the court had no jurisdiction and who had in the past proven distinctly unavailable to lawful process of the court. TWA repeatedly urged some form of undertaking which would have been binding upon Hughes and would have guaranteed the ultimate collectibility of the judgment. TWA's position was not based upon any doubt as to the ability of Toolco at that time to pay the judgment, but rather upon the perceived need of some protection against actions by the elusive Mr. Hughes that would substantially impair that ability—a perception in which the district court concurred (Transcript of Hearing of June 3, 1970, p. 14). Since defendants could have provided this protection at little or no cost in the ways suggested by TWA at the time, it was surely within the discretion of the district court to disallow taxation against TWA of the cost of proceeding in a manner suggested by defendants as more convenient to them. As the district court held, the audits

> "• • • were accepted by the court at the request of the defendant as a less drastic but more costly form of protection of the judgment recovered by the plaintiff. It is perfectly clear from the proceedings in the spring of 1970 that Toolco was most interested in conducting business as usual. 314 F.Supp. 94 (S.D.N.Y. 1970). Since the defendant needed and was using millions of dollars to buy a hotel and an airline, and making alterations to hotels at the time it was called on to bond the judgment, it should bear the cost of allowing business to go on as usual." (A-2, 201a-202a).•

• Discretionary denial in a proper case of additional expenses incurred in connection with securing a stay pending appeal is fully supported by the applicable precedents. Thus in *Aegean (Shipbrokers) Ltd.* v. *Henriksen's Rederi A/S*, 165 F.Supp. 939 (D.Mass. 1958), the prevailing party sought interest on cash collateral supplied in connection with a bond premium. The district court refused to award the interest, stating:

> "[T]he rule requires a showing of reasonableness [of the expenditure]. There is nothing to indicate respondent could not have deposited with the surety interest-bearing securities, or savings-bank books. It is not reasonable to charge petitioner for avoidable consequences." (165 F.Supp. at 940)

Accord: American Hawaiian Ventures, Inc. v. *M.V.J. Latuharhary*, 257 F.Supp. 622, 631 (D.N.J. 1966); *Keystone Shipping Co.* v. *S S Monfiore*, 275 F.Supp. 606, 607 (S.D. Tex. 1967), *aff'd*, 409 F.2d 1345 (5th Cir. 1969).

As for the $66,040.40 taxed by the court of appeals for a title search, a county clerk's filing fee and additional fees paid to the Bank of America under the letter of credit arrangement, defendants made no showing that these charges were reasonable and necessary. The letter of credit documents reveal that the security interests created in favor of the Bank were also security for "any other obligations" of Toolco to the Bank (165a)—hardly matters to be charged against TWA. Nor were such charges disclosed at the time the district court approved defendants' security arrangements. Unlike the stand-by interest charges on the $75 million provided under the letter of credit, which were within the contemplation of TWA as a potential taxable cost should defendants prevail on appeal, undisclosed underlying charges are properly part of the private arrangement between defendants and the Bank.

2. *The court of appeals has directed the allowance of entirely unnecessary expenses as taxable costs*

We are not aware of any action in the history of American jurisprudence in which costs have been taxed in an amount remotely comparable to the amount taxed in this case by the district court and already paid by TWA. Yet the court of appeals judgment directs that this already huge sum should be further grossly inflated by the inclusion

of fees paid by Toolco to its outside auditors which the record demonstrates to have been entirely unnecessary.

As we have shown above, the provision of annual and quarterly financial statements by TWA was *volunteered* by the defendants in lieu of providing any effective undertaking against the dispersion of Toolco's assets at Hughes's suggestion. The record also demonstrates that the further provision that the quarterly financial statements would be based on an independent audit and certified by Toolco's outside auditors was entirely Toolco's idea and never requested by TWA.

Indeed on at least two separate occasions TWA stated to the district court that the financial statements which it desired were those which would be readily available—the regular annual audit, certified by Haskins & Sells, and quarterly financial statements prepared and certified by Toolco's own financial officers.

The subject first came up in open court on May 11, 1970, and TWA suggested that it should receive financial statements comparable to those which a lending institution would expect in connection with a substantial loan, "certified at least annually by an outside auditing firm and at least quarterly by responsible financial authorities of the defendant." (28a)

Next, following defendants' proposal for quarterly audit reports, TWA on June 2, 1970 filed a memorandum and proposed order incorporating its views as to the financial statements. It suggested that the initial report should be certified so that TWA and the court would have accurate information on the existing situation. It went on to say, however:

> "Thereafter, quarterly reports, as opposed to annual reports, can be certified by Toolco's principal financial officer as long as they are prepared on a basis consistent with the annual reports certified by Haskins & Sells." (Doc. 16, p. 4)

In the light of this clear record that TWA never sought to require Toolco to engage on this unnecessarily expensive course of conduct, for the court of appeals to require TWA to bear the expense of Toolco's quarterly audits is completely contrary to the principles laid down by this Court in *Farmer* v. *Arabian American Oil Co., supra.* The opinion of the majority below appears to proceed upon the principle that any expenditure by the prevailing party should be taxable if there is a rule or statute under which such a cost could rationally be allowed. Thus, the majority reasons, since the cost of a supersedeas bond would normally be taxable, the cost of everything furnished by defendants in lieu of a supersedeas bond should be taxable. It does not even comment on the fact that the fees paid to Haskins & Sells were strictly the result of the defendants' own proposal that the quarterly financial statements be verified by an independent audit, a requirement which was never asked for by the plaintiff.

This is far from giving defendants' costs claim the "careful scrutiny" which this Court said in *Farmer* costs proposed by winning parties should always be given. Indeed, when costs already taxed by the district court in the amount of $1,184,045.10 are increased by over $600,000 for such items, the court is clearly moving close to the situation warned against in *Farmer*, in which systems of jurisprudence other than our own deliberately "allow litigation costs so high as to discourage litigants from bringing lawsuits, no matter how meritorious they might in good faith believe their claims to be." (379 U.S. at 235.)

CONCLUSION

Because so very few written opinions deal with the standards applicable to taxation of costs, this decision is likely to have impact far beyond this particular case. We submit that, unless the salutary twin principles that unnecessary costs should be disallowed and that allowance of costs should be left to the district court's discretion are to be broadly eroded in the future, this Court should grant certiorari and reverse.

Respectfully submitted,

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December 18, 1975

APPENDIX

APPENDIX

District Court Decision and Order, January 10, 1974

61 Civ. 2324

TRANS WORLD AIRLINES, INC.,

Plaintiff,

—against—

HOWARD R. HUGHES, HUGHES TOOL COMPANY and RAYMOND M. HOLLIDAY,

Defendants.

METZNER, *D.J.*: Plaintiff moves to review the action of the Clerk in taxing costs in favor of the defendant.

The total costs taxed by the Clerk against Trans World Airlines (TWA) was $1,941,639.15. The defendant Hughes Tool Company (Toolco) agrees that $69,186 was improperly charged against TWA for quarterly audits and thus the total cost taxed should have been $1,872,453.15.

I find that the charge of one-half of one per cent per annum interest ($1,015,625), which in reality was a commitment fee on the $75,000,000 letter of credit issued by the Bank of America is a proper cost to be taxed against the plaintiff. The charge is similar to the premium paid for a supersedeas bond.

The taxation of $66,060.40 to cover charges incurred in connection with security for the letter by Toolco is disallowed. Such costs must be borne by the defendant.

The charges of Haskins & Sells in the amount of $617,765 for the quarterly audits must be disallowed as taxable costs. These audits were accepted by the court at the request of the defendant as a less drastic but more costly form of protection of the judgment recovered by the plaintiff. It is perfectly clear from the proceedings in the spring of 1970 that Toolco was most interested in conducting business as usual. 314 F.Supp. 94 (S.D.N.Y. 1970). Since the defendant needed and was using millions of dollars to buy a hotel and an airline, and making alterations to hotels at the time it was called on to bond the judgment it should bear the cost of allowing business to go on as usual.

The $173,022.75 taxed as costs at the district court level is proper. This case is not akin to those where claims and counterclaims are disposed of in the same trial.

Plaintiff is entitled to a setoff for costs of $4,602.65 regarding the Hughes deposition.

So ordered.

Decision of Court of Appeals, March 7, 1975

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 2—September Term, 1974.

(Argued October 22, 1974 Decided March 7, 1975.)

Docket No. 74-1243

TRANS WORLD AIRLINES, INC.,

Appellee,

v.

HOWARD R. HUGHES, HUGHES TOOL CO. and RAYMOND M. HOLLIDAY,

Appellants.

Before:

MOORE, OAKES and TIMBERS,

Circuit Judges.

Appeal from an order of the United States District Court for the Southern District of New York, Charles M. Metzner, *Judge,* (1) disallowing as costs of an appeal a portion of the expenses necessarily incurred in staying execution of a judgment pending appeal, where because of the size of the judgment a supersedeas bond was impracticable and other provisions were made to secure the judgment, and (2) allowing as a setoff against the costs incurred by the defendant-appellants expenses in preparation for a deposition that had not taken place.

Reversed in part, affirmed in part.

MAXWELL E. COX, DAVIS & COX (Chester C. Davis, David S. Dubin, of counsel), *for Appellant Hughes.*

DUDLEY B. TENNEY, CAHILL, GORDON & REINDEL (Paul W. Williams, Marshall Cox, Michael Tierney, of counsel), *for Appellee.*

OAKES, *Circuit Judge:*

On April 14, 1970, Trans World Airlines, Inc. (TWA), was awarded by the United States District Court for the Southern District of New York, Charles M. Metzner, *Judge*, a default judgment in the amount of $145,448,141.07 in a private antitrust action brought by TWA against Hughes Tool Co. (Toolco).[1] The judgment was subsequently affirmed by this court, *Trans World Airlines, Inc.* v. *Hughes*, 449 F.2d 51 (2d Cir. 1971), but reversed by the Supreme Court. *Hughes Tool Co.* v. *Trans World Airlines, Inc.*, 409 U.S. 363 (1973). This appeal, by defendant-appellants Howard Hughes, Toolco and Raymond M. Holliday, is from an order disallowing costs in connection with the successful appeal to the Supreme Court. Since the original judgment was one of the largest ever granted by a United States court, it is not altogether surprising that the costs involved in connection with the prosecution of the appeal are themselves more substantial than run of the mill judgments even in the Second Circuit. The principles pertaining to cost recovery, however, must remain the same.

The costs disallowed by the district court were a portion of the expenses incurred by Toolco in obtaining a stay

1 While in December, 1972, Hughes Tool Co. changed its name to Summa Corporation, for convenience the prior name is used throughout this opinion.

of execution pending appeal. Because of the unprecedented size of the judgment, the obtaining of a supersedeas bond was impracticable. For this reason Judge Metzner granted a stay of the execution of the judgment pending appeal on condition that Toolco (1) post security by way of a letter of credit in favor of TWA in the amount of $75 million and (2) secure the $83 million plus balance of the judgment, by maintaining its net worth at more than three times the amount of that balance. Toolco was further required to furnish TWA with quarterly statements audited by its independent public accountants to evidence their net worth.

After the successful appeal to the Supreme Court, the district court judge allowed to the Hughes appellants a charge equal to $1,015,625 which was the amount of the fee (one half of one per cent per annum interest) paid on the $75 million letter of credit issued by the Bank of America in lieu of a supersedeas bond. The court disallowed, however, $617,765 in charges for the quarterly audits which were made in connection with furnishing certifications concerning the maintenance of Toolco's net worth at the special level. In addition, the court disallowed $66,040.40 expended by Toolco in connection with providing security to the Bank of America as required under the terms of the letter of credit.

Also involved in this appeal is the allowance of a setoff of $4,602.55 in expenses incurred in the district court by TWA preparatory to the taking of a deposition of Hughes which was never taken because he failed to appear. We affirm the judgment below in part and reverse it in part.

However costs on appeal have been treated in the past, *see, e.g., Broffe* v. *Horton*, 173 F.2d 565, 566 (2d Cir. 1949); *Land Oberoesterreich* v. *Gude*, 93 F.2d 292, 293 (2d Cir.), *cert. denied*, 300 U.S. 663 (1937); *Williams* v.

Sawyer Bros., Inc., 51 F.2d 1004, 1006 (2d Cir. 1931), they are now governed by Fed. R. App. P. 39(a) and (3). Under Rule 39(a), "Except as otherwise provided by law . . . if a judgment is reversed, costs shall be taxed against the appellee unless otherwise ordered . . . ." Under Rule 39(e), "the premiums paid for cost of supersedeas bonds or other bonds to preserve rights pending appeal . . . shall be taxed in the district court as costs of the appeal in favor of the party entitled to costs under this rule."[2] The district court disallowed the quarterly audit charges, saying,

> These audits were accepted by the court at the request of the defendant as a less drastic but more costly form of protection of the judgment covered by the plaintiff. It is perfectly clear from the proceedings in the spring of 1970 that Toolco was most interested in conducting business as usual. 314 F. Supp. 94 (S.D.N.Y. 1970). Since the defendant needed and was using millions of dollars to buy a hotel and an airline, and making alterations to hotels at the time it was called on to bond the judgment, it should bear the costs of allowing business to go on as usual.

It is necessary, even if not conclusive of the result, to see just how the charges for the audit came about. Adoption of the Federal Rules of Appellate Procedure, effective July 1, 1968, resulted in the repeal of Fed. R. Civ. P. 73(d) which had provided that the district court should fix a supersedeas bond in "the whole amount re-

2 Rule 37 of the Rules of the Supreme Court which deals with costs on appeal sheds no light on the proper treatment of premiums paid for bonds necessary to preserve rights pending appeal. The Sureme Court Rule states only that

> In cases of reversal or vacating of any judgment or decree by this court, costs shall be allowed to the appellant or petitioner, unless otherwise ordered by the court.

maining unsatisfied . . . unless the court, after notice and hearing and for good cause shown, fixed a different amount . . . ." That language permitted the district court in a case of hardship to issue a stay of execution, but after the repeal of Rule 73(d) the only requirements relating to supersedeas bonds were Fed. R. Civ. P. 62(d) and Local Rule 33 of the Rules of the District Court for the Southern District of New York, neither of which contained the express language of former Fed. R. Civ. P. 73(d) allowing discretion to the district judge in fixing bond provisions for appeal.[3] Nevertheless, exercising discretion, District Judge Metzner quite properly held that he had the power to provide for a form and amount of security different from the supersedeas bond. *See* 9 J. Moore, Federal Practice ¶ 208.06[1] at 1416 (2d ed. 1969).

The district court's decision in this matter came only after a number of hearings at which TWA and Toolco expressed their diametrically opposed positions with respect to the need for a bond to protect the judgment during appeal. The Hughes appellants argued that since Toolco (100% owned by Hughes) had over $500 million in net worth, there was no need to post any bond. Instead, Toolco offered to create a lien on specific property having a value in excess of $45 million, the amount of the compensatory portion of the judgment. TWA countered by demanding either full payment of the judgment or the posting of a bond in the amount of $161 million as required by Local Rule 33, n.3 *supra*.

After the court indicated an unwillingness to accept either of these extreme positions, Toolco made the further

3 Rule 33 of the General Rules of the District Court for the Southern District of New York provided that the bond should be in the amount of 111 per cent of the judgment and an additional $250 to cover costs. This would have required a bond in excess of $161 million.

offer to provide TWA throughout the pendency of the appeal with financial reports evidencing that Toolco's net worth remained in excess of three times the amount of the judgment. The court made its ultimate decision after considering that during the court of negotiations relative to the supersedeas bond Toolco acquired The Dunes Hotel in Las Vegas, Nevada, for a cash consideration of $35 million and was engaged in another transaction in which it would be required to expend another $11 million. In ruling on the bond for appeal, the district court said, "Part of business as usual must include some recognition of the rights of this plaintiff that has acquired a judgment against Toolco for violation of the antitrust laws of the United States .... It must be prepared to assume some financial burden to achieve 'business as usual.'" At the same time, however, the court stated that it "fully appreciate[d] that under present conditions a supersedeas bond in the amount contemplated by Rule 33 is not practicable under the circumstances."

The court then went on to order Toolco to post security in the form required by General Rule 31(b)[4] in the amount of $75 million. Judge Metzner ordered that the balance of $86,447,686.59 "shall be secured along the lines suggested by the defendants as to the maintenance of Toolco's net worth at three times the amount of such balance" and directed the parties to come up with the details of that arrangement. After the usual sparring the embattled parties did so. As previously stated, a letter of credit was obtained, with agreement by the parties, as an acceptable substitute for the $75 million bond which would otherwise have

4 General Rule 31(b) provides that every bond or undertaking must either "(1) be secured by the deposit of cash or government bonds in the amount of the bond, undertaking or stipulation or be secured by (2) the undertaking of guarantee of a corporate surety holding a certificate of authority from the secretary or treasurer."

been required. The parties agreed that the net worth which Toolco would maintain would be $335 million and that within 120 days of the end of each calendar quarter there would be presented audited and certified balance sheets to that effect, together with certificates by the treasurer of Toolco as to the maintenance of that net worth. The Hughes appellants also agreed not to distribute or transfer assets to reduce the net worth to less than the $335 million amount. This was incorporated in a consent order executed by the parties and approved by the court.

In our view the costs of the audits under the consent order were costs in lieu of providing a supersedeas bond as provided by the rules.[5] Just as the court allowed the one-half of one per cent premium on the letter of credit, so too it should have allowed the costs for the audits. To be sure, this was a price of doing business as usual, but that is true in the case of any supersedeas bond on appeal. We fail to see how the court's wise exercise of its discretion in an unusual case not to require security by way of a bond may be used to justify the disallowance of the costs of procuring alternate security for the appeal. When a judgment is reversed, as this one was, the costs of obtaining a supersedeas bond have long been held to be a proper item of costs. *Berner* v. *British Commonwealth Pacific Airlines, Ltd.*, 362 F.2d 799 (2d Cir. 1966); *Land Oberoesterreich* v. *Gude, supra.* If a defendant has to liquidate all or a substantial part of his business in order to exercise the right to appeal, then the

5 TWA seems to make the suggestion, but does not really argue, that the Hughes appellants' failure to press their motion filed August 9, 1961, to dismiss and for summary judgment on the ground that the anti-trust violations were within the jurisdiction of the CAB somehow disentitles them to costs here. But this was not a ground for the decision below and there is no showing that, even if pressed, the district court or court of appeals would have found any other way, or that TWA could not have itself pressed for a hearing on the motion.

appeal may surely be of doubtful value. The purpose of the stay was to permit Toolco to conduct business as usual, and so long as TWA was adequately secured Toolco was entitled to do so; in that sense, the cost of any supersedeas bond is always a cost incurred to permit business as usual. We do not see how any distinction can be made between the interest payable for the letter of credit on the one hand and the quarterly audits on the other, since they both went to providing adequate security to TWA. While, to be sure, costs are allowable in the exercise of the district court's discretion,[6] that discretion must not be exercised arbitrarily; "Discretion without a criterion for its exercise is authorization of arbitrariness." *Brown* v. *Allen*, 344 U.S. 443, 496 (1953). The district court sets forth no criterion for the disallowance of this item of costs. Indeed, the cost of the audits protected $86 million of the judgment for a period of two and three-quarters years, which is less than one-third of one per cent a year, or, in other words, less than the fee allowed in connection with the letter of credit. Had a letter of credit been obtained for the full amount of the judgment and the same one-half of one per cent been charged, it would have generated a fee amounting to an additional $552,000 in excess of the $617,000 of audit costs.

The district court disallowed the $66,040.40 cost of securing the letter of credit without stating any reason therefor. The security consisted of a real estate loan granted against a recorded deed of trust on properties owned by Hughes in California. In conjunction with the

6 *See, e.g., Fanchon & Marco, Inc.* v. *Paramount Pictures*, 202 F.2d 731 (1953), where successful appellants recovered only one-half of their costs on appeal, both because they were only partially successful with respect to the issues raised on appeal and because they printed an unnecessarily large transcript for appeal. *See also Hamdi & Ibrahim Mango Co.* v. *Reliance Insurance Co.*, 291 F.2d 437 (2d Cir. 1961), where there was an appeal and cross appeal and costs of the appeal were apportioned.

preparation and documentation of that real estate loan Hughes paid the Bank of America a fee of $12,500 and in addition paid $53,488.80 for title insurance plus $51.60 for the recording of the deed of trust.

It appears on uncontradicted affidavits of the Bank of America that "a condition precedent" to the issuance of the letter of credit was that it be secured by Hughes. The costs in connection with furnishing this security would surely be allowable were it not for the fact that the terms of the letter of credit indicate that it also constituted security for "any other obligations" of Toolco to the Bank of America. While it may be, as TWA suggests, that the Bank of America had for many years been the lending bank both for Toolco and for Howard Hughes personally, no objection is taken here to the allowance of the costs of the one-half of one per cent charged by the bank for the letter of credit, and the logic in disallowance of the costs in connection with the security that were "a condition precedent to the issuance of the letter of credit . . ." escapes us. Regardless of Hughes' or Toolco's previous course of dealings with the bank, apparently the bank insisted upon additional security for the issuance of the $75 million letter of credit, an insistence which we do not find terribly extraordinary. In our view it would be arbitrary to treat the costs for security any differently from the fee charged for the letter of credit itself, and, of course, we have in mind that the letter of credit arrangement, which was consented to and approved by TWA, did indeed cost less than a surety bond would have cost and hence in the end—because TWA lost on the appeal—saved it money. As we have said, TWA cannot dispute that had a surety bond been furnished the costs of premiums therefor would have been taxable to it as the unsuccessful appellee. *Cf. Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Products*, 316 F.2d 275 (9th Cir. 1962).

With a measure of gall, however, defendant-appellants contest the award by the district court to TWA of a setoff of $4,602.65 for their expenses incurred in preparation for the Hughes deposition that was precipitously canceled by the last-minute announcement that Hughes would not appear. The imposition of this item was a proper exercise of the court's discretion under Fed. R. Civ. P. 37(b)(2) because the appellants chose at the last possible moment to disobey the court's lawful order that Hughes appear for his deposition on February 11, 1963. Any contention that the fact that the Hughes appellants ultimately prevailed in the appeal entitles them not to have this setoff is purely frivolous. Awards under Rule 37(b)(2) are made in connection with the court's internal control over its own procedures and are necessary to the proper administration of discovery proceedings which in turn are essential to the conduct in an orderly fashion of law suits under the Federal Rules of Civil Procedure. *See, e.g., Gibbs* v. *Blackwelder*, 346 F.2d 943, 947 (4th Cir. 1965); *Haney* v. *Woodward & Lothrop, Inc.*, 330 F.2d 940, 946 (4th Cir. 1964).

Judgment affirmed in part, reversed in part; costs on this appeal to neither party.

TIMBERS, *Circuit Judge*, (dissenting):

There are few areas where I had supposed it was more axiomatic that the exercise of discretion by a trial judge should not be disturbed absent the clearest showing of abuse than in the taxation of costs. To the extent that the majority substitutes its discretion for that of the trial judge who had disallowed expenses of $617,765 incurred by Toolco in providing quarterly audit reports to TWA concerning Toolco's net worth, I respectfully dissent.

With respect to Judge Metzner's disallowance of this item of costs,[1] there not only was no showing of abuse of discretion, but in my view the record demonstrates with abundant clarity that the judge's action represents a classic exercise of sound discretion by a thoroughly experienced trial judge in the context of exceedingly complex litigation with which he has lived for a decade and a half.

I agree with the majority that allowance or disallowance of this item of costs was within the discretion of the district court. The narrow issue before us therefore is whether the record demonstrates "the court's wise exercise of its discretion", as the majority correctly states. P. — *supra*. The crux of the majority's reversal of Judge Metzner's disallowance of the expenses of the quarterly audit reports appears to be its belief that "[t]he district court sets forth no criterion for the disallowance of this item of costs." P. — *supra*. With deference, I disagree. Viewed as a whole, the record clearly supports the district court's exercise of discretion.

During the period from May 20 to June 3, 1970, Judge Metzner conducted three hearings with respect to the appropriate means by which Toolco, pending appeal, might secure the $145,448,141.07 judgment which had been entered against it. On June 10, 1970, the judge entered an order directing Toolco to post security in the form of a $75 million bond, with the balance of the judgment to be secured "along the lines suggested [by Toolco] as to the maintenance of Toolco's net worth at three times the amount of such balance." Thereafter, counsel for Toolco and counsel for TWA arranged for Toolco to post a $75 million super-

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1 I agree with the majority's disposition of the other two challenged items of costs involved on this appeal, i.e. the affirmance of the district court's allowance of a setoff to TWA of $4,602.65 deposition expenses incurred by it as a result of Hughes' contumacy, and the allowance to Toolco of $66,040.40 expenses incurred by it in obtaining the $75 million letter of credit.

sedeas bond and for Toolco to maintain its net worth at $335 million. On June 16, 1970, the judge entered an order embodying this arrangement. In accordance with Toolco's previous offers, the order directed Toolco to furnish TWA with certified quarterly audits to demonstrate that Toolco's net worth was so maintained. On June 25, 1970, the judge modified his prior order and permitted Toolco to substitute a $75 million letter of credit for the supersedeas bond.

If this were all that the record showed, I would agree with the majority that the expenses of the quarterly audit reports might appropriately be held to be costs reasonably incidental to securing TWA's judgment and therefore properly chargeable to TWA upon the ultimate reversal by the Supreme Court. *Berner* v. *British Commonwealth Pacific Airlines, Ltd.*, 362 F.2d 799 (2 Cir. 1966). But the record discloses other critical facts which in my view have a direct bearing on the district court's exercise of discretion in disallowing this item of costs.

The district court's order of June 10, 1970 emerged only after intense adversary acrimony between the parties and counsel regarding the security to be provided. Toolco repeatedly rejected suggestions by the court and by TWA with respect to means by which Toolco might secure the judgment at little or no cost to it and with minimal disruption of its business. For example, Toolco rejected suggestions that Hughes, the sole stockholder of Toolco, subject himself to the jurisdiction of the court for the sole purpose of guaranteeing payment of the judgment; that Hughes pledge his stock in Toolco to TWA, coupled with a court ordered restriction on the payment of dividends by Toolco to Hughes or any other material disposition of Toolco assets to Hughes or otherwise; that Toolco deposit marketable securities or other cash equivalents to secure the judgment; or that Toolco give TWA liens on certain of Toolco's properties. Each of these

suggestions was rejected by Toolco in favor of the obviously more costly program of net worth maintenance upon which Toolco insisted. In short, Toolco demanded, as a condition to its securing a judgment against it for violation of the antitrust laws of the United States, that it be permitted to do "business as usual", including the acquisition of the Dunes Hotel in Las Vegas, Nevada, for $35 million cash and the expenditure of millions of dollars for other acquisitions.

A fair reading of the transcript of November 15, 1973 where TWA's exceptions to the Clerk's taxation of costs were considered, and the district court's order of January 10, 1974 disallowing the audit expenses, far from setting forth "no criterion for the disallowance of this item of costs" as the majority suggests, p. — *supra*, demonstrates that the district court based its disallowance of the audit expenses on its finding that such expenses were unnecessary and unreasonable in light of the other less costly alternatives which had been suggested to Toolco but categorically rejected by it.

The majority in effect has substituted its discretion for that of the trial judge who disallowed the audit expenses upon the express finding that "[t]hese audits were accepted by the court at the request of defendant as a less drastic but more costly form of protection of the judgment recovered by the plaintiff. . . . Since the defendant needed and was using millions of dollars to buy a hotel and an airline, and making alterations to hotels at the time it was called on to bond the judgment, it should bear the cost of allowing business to go on as usual." Opinion and Order of Judge Metzner dated January 10, 1974.

The majority's brushing off this finding of the district court results in placing the imprimatur of this Court on permitting a party called upon to bond a judgment to

conduct business as usual pending appeal and then to saddle his opponent with the expenses of doing so—in the teeth of an express finding by the district court that such expenses were unnecessarily costly, clearly avoidable and therefore not properly chargeable as taxable costs.

Finally, the unfortunate precedent which the majority establishes in this most unappealing case strikes me as ignoring the admonition of the Supreme Court in *Farmer* v. *Arabian American Oil Company*, 379 U.S. 227, 235 (1964), that:

> "Items proposed by winning parties as costs should always be given careful scrutiny. Any other practice would be too great a movement in the direction of some systems of jurisprudence, that are willing, if not indeed anxious, to allow litigation costs so high as to discourage litigants from bringing lawsuits, no matter how meritorious they might in good faith believe their claims to be." [2]

I respectfully dissent.

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2 The Supreme Court in *Farmer* reversed an en banc decision of the Court of Appeals for the Second Circuit, 324 F.2d 359, and affirmed the District Court's exercise of discretion in the taxation of costs. 31 F.R.D. 191 (Weinfeld, *J.*). Judge Smith, speaking for three of the dissenters in the Court of Appeals, summarized their rationale in noting that the decision of the majority

> ". . . abandons the traditional scheme of costs in American courts to turn in the direction of the English practice of making the unsuccessful litigant pay his opponent's litigation expense as well as his own. It has not been accident that the American litigant must bear his own cost of counsel and other trial expense save for minimal court costs, but a deliberate choice to ensure that access to the courts be not effectively denied those of moderate means." 324 F.2d at 365.